

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs July 17, 2007

**STATE OF TENNESSEE v. JOHN D. ADKINS**

**Appeal from the Criminal Court for Sumner County**  
**No. 703-2005     Jane Wheatcraft and Dee David Gay, Judges**

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**No. M2006-02583-CCA-R3-CD - Filed January 23, 2008**

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The defendant, John D. Adkins, appeals from his Sumner County jury trial conviction of driving under the influence, a Class A misdemeanor, for which he received a sentence of eleven months and twenty-nine days, with forty-eight hours to be served in jail and the remainder on probation. In this appeal, the defendant claims that the successor judge who ruled on his motion for judgment of acquittal should have granted him a new trial because the judge did not preside at the trial and that the evidence is not sufficient to support his conviction. We conclude that there was no error and that the evidence was sufficient. We affirm the trial court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

David A. Doyle, District Public Defender, and Adam R. Michael and Michael Gene Anderson, Assistant Public Defenders, for the appellant, John D. Adkins.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Lyle Anthony James, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

At the defendant's trial, Corporal Wayne Clifford of the Hendersonville Police Department testified that he made a traffic stop of the defendant on March 10, 2005, at 2:38 a.m. He said he saw the defendant's car cross the yellow "fog" line four times. He said that after he stopped the defendant, he noticed a moderate odor of alcohol coming from inside the defendant's car and observed that the defendant's eyes were bloodshot and glassy. He said the defendant stated he had consumed three alcoholic drinks. He said the defendant first stated that he had crossed the yellow line because he was lighting a cigarette and then said the front end of his car was out of alignment. He said the defendant failed one field sobriety test, "did not perform . . . satisfactor[ily]" on a second

test, and did not complete a third test because Corporal Clifford stopped the test for the defendant's safety. He said the defendant told him before completing the field sobriety tests that he had an inner ear infection and a knee problem. He said the defendant also informed him that he took Zoloft. He said that based upon the defendant's driving, the number of drinks he reported consuming, his medication, and his performance on the field sobriety tests, he formed the opinion that the defendant could not operate a motor vehicle safely and arrested him for driving under the influence. He said the defendant refused to submit to a chemical test to determine his blood alcohol content.

Corporal Clifford identified a videotape that he recorded of his encounter with the defendant. He acknowledged that the tape did not include his initial observation of the defendant's crossing the yellow line. The tape was played for the jury. It depicts the stop and the field sobriety tests and contains the audio of the defendant's refusal to submit to a chemical test. Corporal Clifford referred to the test as a "chemical test" and a "blood test." The defendant did not request a breath test or inquire who would perform the test. The defendant stated on the tape that he had chronic ear infections for which he was taking antibiotics.

Lisa Phillips testified that she knew the defendant socially. She said she knew he had problems with his ears and had seen him stumble on a dance floor. She said she was also aware that the defendant had knee problems and had seen him stumble and look clumsy due to the knee problems. She recounted an occasion on which the defendant had a difficult time walking a long distance from a parking space to and from a Titans football game.

The defendant testified that he drank three normal-sized Bud Light beers on the night he was arrested. He said he used prescription Zoloft at the time of his arrest. He said he frequently had ear infections during the winter months, which affected his balance. He said he also had knee problems, particularly during the winter. He said he declined the chemical test because Corporal Clifford informed him Sumner County did not offer breathalyzer tests and he was concerned about Corporal Clifford's lack of credentials to draw blood. He stated he assumed Corporal Clifford would be the person drawing blood and was afraid the officer "could harm vessels or tendons." He admitted he did not inquire whether Corporal Clifford would be the person drawing blood.

Corporal Clifford testified on rebuttal that the defendant never asked him about a breath test. He said he could have drawn blood if required to do so because he was an EMT and a flight medic for the Tennessee Air National Guard. He said, however, blood tests are performed at the emergency room by a nurse.

The jury found the defendant guilty of driving under the influence. The defendant filed motions for judgment of acquittal and for a new trial. The trial judge retired, and the successor judge denied the motion. The defendant filed this appeal.

## I

In his first issue, the defendant argues that the judge who denied the post-trial motions, who was not the trial judge, erred in denying the motions because he could not perform the mandatory duty of the trial judge as thirteenth juror. He argues that witness credibility was “an overriding issue” in this case and that the successor judge cannot make an accurate assessment, having not observed the trial. The state argues that the trial court did not err because witness credibility was not an overriding issue and a sufficient record existed to support the jury’s verdict.

Rule 33(d) of the Tennessee Rules of Criminal Procedure provides that a “trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence.” The rule “is the modern equivalent to the ‘thirteenth juror rule,’ whereby the trial court must weigh the evidence and grant a new trial if the evidence preponderates against the weight of the verdict.” State v. Blanton, 926 S.W.2d 953, 958 (Tenn. Crim. App. 1996). Our supreme court has held that the rule “imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the jury’s verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment.” State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995).

Tennessee Rule of Criminal Procedure 25(b) addresses situations when the trial judge is unable to perform post-verdict duties due to absence, sickness, death, or other disability. The rule provides in pertinent part,

(b) After Verdict of Guilt. –

(1) In General. –After a verdict of guilty, any judge regularly presiding in or who is assigned to a court may complete the court’s duties if the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability.

(2) Granting a New Trial. –The successor judge may grant a new trial when that judge concludes that he or she cannot perform those duties because of the failure to preside at the trial or for any other reason.

Tenn. R. Crim. P. 25(b).

This court has previously concluded that “a successor judge’s consideration, pursuant to Rule 25(b) . . . of whether the duties of the original judge can be met must include an assessment of his or her ability to act as a thirteenth juror, including witness credibility.” State v. Nail, 963 S.W.2d 761, 765 (Tenn. Crim. App. 1997) (citing State v. Bilbrey, 858 S.W.2d 911, 914 (Tenn. Crim. App. 1993)). “In assessing whether the successor judge can act as thirteenth juror, the judge would need to determine the extent to which witness credibility was a factor in the case and the extent to which he had sufficient knowledge or records before him in order to decide whether the credible evidence,

as viewed by the judge, adequately supported the verdict.” Brown, 53 S.W.3d 264, 275 (Tenn. Crim. App. 2000). If the successor judge is unable to make these determinations, the judge cannot approve the verdict, and a new trial must be granted. Id. (citing Nail, 963 S.W.2d at 766). A judge who is first exposed to the case when called to preside over a motion for new trial may rule on the motion if the record is available as long as witness credibility is not an overriding issue. Id. When witness credibility is the primary issue raised in the motion for new trial, the successor judge may not approve the judgment and must grant a new trial. Id.

Upon review, we conclude that witness credibility was not an overriding issue. Many of the facts were undisputed. The defendant did not contest that he crossed the yellow line four times before Corporal Clifford stopped him, that he drank three beers, that his eyes were bloodshot and glassy, that his car smelled of alcohol, that he was also taking a prescription anti-depressant, or that he performed inadequately on the field sobriety tests. His testimony and that of his friend about his ear and knee problems were not in dispute. Corporal Clifford testified that the defendant reported these issues to him, and the videotape contains evidence of the defendant’s report of these alleged problems. The defendant argues that there was contradictory testimony about a breathalyzer test. He asserts that his claimed willingness to take a breath test is evidence that he was not under the influence. However, the videotape contains the audio recording of Corporal Clifford’s advising the defendant of the implied consent law and the defendant’s refusal to submit to a chemical test. The videotape does not contain any request by the defendant for a breathalyzer test. The record reflects that the post-trial judge reviewed the evidence available to him, determined that he had sufficient information to decide whether credible evidence supported the verdict, and ultimately determined that such evidence supported the verdict. We conclude that the weight of the credible evidence renders the defendant’s claim relative to a dispute in the evidence about the breathalyzer test minimal. Witness credibility was not an overriding issue, and a new trial was not required. See Brown, 53 S.W.3d at 275.

## II

The defendant also claims that the evidence was insufficient to support his conviction. Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

Tennessee Code Annotated section 55-10-401 states in pertinent part:

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system . . . .

In the light most favorable to the state, the evidence reflects that the defendant drank three beers while he also had an anti-depressant in his system, failed to keep his car within his lane of travel, and performed poorly on field sobriety tests. From this evidence, a rational trier of fact could conclude that he was driving while under the influence. The evidence is sufficient to support his conviction.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE